In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-306

UNITED VAN LINES, INC.,
Petitioner,

vs.

KARL VONDER LINDEN and His Wife,
CAROL VONDER LINDEN,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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OBJECTIONS TO QUESTIONS PRESENTED

1. The Respondents object to the questions presented as set forth in the Petition on the grounds that:

a) The questions are not posed by either the law or the facts of the case;

b) Neither of the questions presented are part of this action; and

c) The questions were presented, considered, and rejected by the New Mexico District Court and the rejection affirmed by the New Mexico Supreme Court.

d) The questions as set forth by the Petitioner attempt to inject interpretation of the statutes rather than simply applying the law of the case to the facts as was done by the New Mexico courts.

OBJECTIONS TO STATEMENT OF THE CASE

The Petitioner recites, beginning on the bottom of page 4 of his petition, "additional factual details" none of which were found by the Court, and all of which beg questions of fact.

Facts as found by the Court are set forth in the transcript beginning on page 154 and are further set forth on page A10, A11 and A12 of the Petition.

Respondents further object to the Statement of the Case on the grounds that the statement sets forth argument rather than statements of fact.

REASONS FOR DENYING WRIT

1. The decision of the New Mexico Supreme Court was a correct application of the common law of common carriers, federal statutes, and decisions of the United States Supreme Court and did not involve the validity, construction or enforcement of a federal statute.

2. The New Mexico Supreme Court was correct in its decision denying the Petitioner the right to limit its liability because of Petitioner's violation of ICC regulations.

3. Title 49 U.S.C. Section 20 (11) is merely a codification of the common law of common carriers. *Secretary of Agriculture* v. *U. S.*, Utah 1956, 76 S.Ct. 244, 350 U.S. 162, 100 L.Ed. 173; *Missouri Pacific Railways* v. *Elmore & Stahl*, Texas 1964, 84 S.Ct. 1142, 377 U.S. 134, 12 L.Ed. 2d 752, rehearing denied 84 S.Ct. 1880, 377 U.S. 984, 12 L. Ed. 2d 752.

4. Title 49 U.S.C. Section 20 (11) does not confer original, exclusive jurisdiction on the federal district court

but recognizes within the four corners of the statute state court jurisdiction by requiring actions brought in state courts to be brought in states in which defendant carriers operate. State courts and federal courts have concurrent jurisdiction in cases against carriers for damages to goods. 13 C.J.S. 507; 14 Am.Jur.2d 114.

5. Title 28 U.S.C. Section 1337 is not applicable in the case at bar in that there was no federal questions involved. The mere existence of the questions of federal law somewhere within the controversy is not enough for removal. *Eickhof Construction Co.* v. *Great Northern Railway Co.*, D.C. Minn. 1968, 291 F. Supp. 144.

ARGUMENT

I. The New Mexico Supreme Court's Decision Was Not Contrary to the Federal Statutes and Decisions of the United States Supreme Court.

The Petitioner attempted on two different occasions to remove the matter to federal district court. Once on the allegations set forth in the complaint (Tr. 1-7), and once on a statement which the Petitioner took as an amendment to the pleadings. The relevant testimony in this matter is the statement made to the trial court when counsel for the Respondents was asked by the Court:

> ". . . the plaintiff is proceeding apparently on the theory of common carrier liability. Is that correct?"

to which counsel for the Respondents answered:

> "Yes." (Tr. 355)

Such a statement certainly does not constitute an amendment of pleadings, and in no way changed the Respon-

dents' theory of the case, which was brought and tried on negligence to which the law of common carriers was correctly applied by both New Mexico District and Supreme Courts. Their decisions were in accord with the requirement that controversies between carriers and shippers be determined by applying federal rules and regulations and the common law, as codified in Title 49 U.S.C. Section 20 (11). *New Hampshire Fruit and Produce Co.* v. *Hines,* 1922, 116 Atl. 243, 97 Conn. 255; *Galveston H & SA Railway Co.* v. *Wallace,* 32 S.Ct. 205, 223 U.S. 481, 56 L.Ed. 516; *Nelms, Kehoe and Nelms* v. *Davis,* D.C. Texas 1921, 277 F. 982; *Deaver-Jeter Co.* v. *Southern Railway Co.,* (1913) 79 S.E. 709, 95 S.C. 485.

In order to invoke the jurisdiction of the federal district court, there must be a question as to the validity, construction or enforcement of laws regulating interstate commerce, none of which were present in the case at bar. *Adams* v. *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers,* 262 F.2d 835 (C.A. Kan. 1959); *Strachman* v. *Palmer,* 82 F. Supp. 161, D.C. Mass. 1949.

II. The New Mexico Supreme Court Was Correct in Holding That the Petitioner Could Not Limit Its Liability Due to Non-Compliance With ICC Regulations.

The Petitioner argues that the New Mexico Supreme Court erred in failing to uphold the release value of $1.25 per pound since there was no showing of fraud, deceit or willful misconduct on the part of the carrier. Such a statement is contrary to law.

On July 20, 1973, Mr. Tanner, agent for the Petitioner, prepared the order for service (Tr. 315) and signed the Vonder Lindens' name on or about July 23, 1973 instead

of having one of the Vonder Lindens sign the order (Tr. 318) in violation of Title 49 C.F.R. Section 1056.9 (b). The carrier did not deliver a copy of the order for service to the shipper until after the goods had been moved from Socorro, New Mexico to Palo Alto, California (Tr. 329) in violation of Title 49 C.F.R. 1056.9 (a). The carrier's agent did not have a waiver of the shippers' signatures in writing, which is in violation of 49 C.F.R. 1056.9 (b).

The carrier knew what was required by ICC regulations and willfully failed to comply.

In order for a declaration of value by a shipper to be binding, the shipper must be provided with a genuine opportunity to choose between higher and lower rates based upon valuation of the goods. *Caten* v. *Salt Lake City Movers and Storage, Inc.,* 149 F.2d 428 at 432 (1945)

The burden of full liability for damaged goods is placed on the carrier unless the carrier shows that he has fully complied with the statutory requirements for limiting his liability. *Thomas Electronics, Inc.* v. *H. W. Tayton Co.,* D.C. Penn. 1967, 277 F. Supp. 639; *Rhoades* v. *United Airlines, Inc.,* 340 F.2d 481, 486; *New York NH and HR Co.* v. *Nothnagle,* 346 U.S. 128 at 135, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); *Clubb* v. *Hetzel,* 165 Kan. 549, 198 P.2d 142; *Brannon* v. *Smith, Dray Line and Storage,* (6th Cir. 1972) 456 F.2d 260.

The carrier's driver testified that he explained nothing ever happened to him and told the Vonder Lindens that 60¢ per pound is what the Government used on their shipments (Tr. 190); that the insurance amount was blank when he received the papers (Tr. 190); and that he never handled anything over $1.25 per pound (Tr. 211). Mr. Vonder Linden testified that he was instructed by the driver to show 60¢ per pound (Tr. 285). The record is

void of any testimony indicating that either of the Respondents had a reasonable opportunity to evaluate the insurance alternatives and make a decision.

The Petitioner would urge the Court that the Respondents having a copy of a booklet entitled "Information to Shippers", which was given them in 1970 by an agent of the carrier for another move, fulfills the requirements of Title 49 C.F.R. Section 1056.7, which requires a copy of the booklet BOp 103 "to be given every prospective shipper . . . and obtain a receipt therefor prior to the day on which the order for service is placed". The facts are uncontroverted that the carrier's agent who wrote the order did not give the shipper a copy of BOp 103. It is uncontroverted that the driver, who had never seen a copy of BOp 103 before trial time, did not give the plaintiffs a copy of BOp 103. Failure to supply the shipper a copy of BOp 103 was a direct violation of Title 49 C.F.R. 1056.7 and the carrier's attempt to relate back the plaintiffs' possession of the booklet entitled "Information to Shippers" received in a move three years earlier, before BOp 103 was required, fails because of remoteness of time as it relates to this movement of goods. Any attempt on the part of the carrier to limit its liability contravenes a strong public policy expressed in the common law and codified in Title 49 U.S.C. Section 20 (11). *Chandler* v. *Aero Mayflower Transit Co.*, 374 F.2d 129 (1967) at 135.

The Court's attention is called to the fact that the proceeding before the New Mexico District Court was a proceeding for the purpose of establishing whether or not the carrier was liable to the shipper with the element of damages to be tried at a later date in the event the Court found liability. On July 11, 1977, six months after trial as to liability, the parties stipulated that the loss of the Respondents was, in fact, $51,000.00 (Tr. 169), for which loss the Petitioner was tendering the sum of $12,937.50.

There is no rule of law or equity which would allow such a patently unjust result in light of the numerous flagrant admitted violations of ICC regulations by the carrier.

The true question here is, who will bear the $51,000.00 loss of the shippers' goods due to their destruction while in transit by the carrier? The shippers who entrusted their goods to United Van Lines, Inc. for safe movement, or the carrier who violated virtually every ICC regulation that would have informed the shippers of their rights before placing the order for service? Any court, state or federal, would decide the case the same on the facts of the case and the applicable law.

CONCLUSION

The Petitioner has set forth no questions of fact or law which would warrant this Court granting a Writ of Certiorari to review the decision of the New Mexico Supreme Court. The Respondents pray the Court deny the Petition of United Van Lines, Inc. for a Writ of Certiorari.

Respectfully submitted,

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